

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LA MAR GUNN,)
Plaintiff,)
)
v.)
)
AMBAC ASSURANCE,)
EQCC HOME EQUITY LOAN)
TRUST 1998-2,)
EQCC HOME EQUITY LOAN)
TRUST 1998-3,)
Defendants.)

C.A. No.: 11C-11-128 FSS
(E-FILED)

Submitted: December 30, 2011
Decided: March 21, 2012

ORDER

Upon EQCC HOME EQUITY LOAN TRUST 1998-2 and EQCC HOME EQUITY LOAN TRUST 1998-3's Motions to Dismiss – GRANTED.

On the pleadings, this is an ejectment case. Plaintiff wants to oust Defendants from “his” property. The overarching problem is that after U.S. Bank, as Trustee for the Holders of the EQCC Home Equity Loan Asset Backed Certificates, Series 1998-3 foreclosed, the sheriff sold the property to the bank. All of that took years to litigate. The sale was confirmed and, after remand for discovery,¹ the foreclosure, sale, and confirmation were affirmed on appeal.

¹ *Gunn v. U.S. Bank Nat. Ass’n*, No. 102, 2009 (Del. Dec. 1, 2009) (ORDER).

After the foreclosure, sale, and confirmation were affirmed,² Plaintiff filed a complaint in the Court of Chancery, seeking to nullify the sale. That case was dismissed on *res judicata* grounds, and that was affirmed.³ Thus, the foreclosure, sale and confirmation have been litigated and finally decided, twice. So, at least, this is Plaintiff's third challenge to the foreclosure.

Plaintiff's caption fails to identify all Defendants.⁴ The court knows from the earlier litigation, however, that U.S. Bank acts as Trustee for the Holders of the EQCC Home Equity Loan Asset Backed Certificates, Series 1998-3, a mortgage securitization trust.⁵ The contested property's original mortgagor, Equicredit, assigned its mortgage to the EQCC trust in 2002.⁶ Ambac Assurance, not a subject of this decision, is "an issuer of financial guarantee insurance policies."⁷ Last, Select Portfolio Servicing, Inc., not named in Plaintiff's caption, but a defendant in other cases filed by Plaintiff, is the servicing agent and attorney-in-fact for U.S. Bank.⁸

² *Gunn v. U.S. Bank Nat. Ass'n*, 998 A.2d 850 (Del. 2010) (TABLE).

³ *Gunn v. U.S. Bank Nat. Ass'n*, C.A. No. 5917-VCL (Del. Ch. Aug. 18, 2011) (Laster, V.C.), *aff'd*, 35 A.3d 419 (Del. 2011) (TABLE).

⁴ Super. Ct. Civ. R. 10(a) ("Every pleading shall contain a caption . . . includ[ing] the names of all the parties.").

⁵ *Gunn*, No. 102, 2009, at 2.

⁶ *Id.*

⁷ Ambac's Br. in Supp. of Mot. to Dismiss ¶ 5.

⁸ See SPS's Br. in Supp. of Mot. to Dismiss.

I.

The court takes notice from the earlier litigation, also referred to by Plaintiff in the instant complaint, that when Plaintiff purchased the property in November 2003, taking a quitclaim deed, it was with legal and actual notice that the sellers were bankrupt and the property was subject to a recorded mortgage, then in default and in foreclosure. Specifically, on July 19, 2002, 16 months before Plaintiff bought the property, a mortgage foreclosure was filed by a bank identifying itself as the original lender's assignee.⁹ The mortgage and the foreclosure were of public record when Plaintiff took title. Nevertheless, Plaintiff decided to buy the property and he took through a deed that did not promise he was getting marketable title.

The gist of Plaintiff's allegations is, in his words: "defendants appear to have orchestrated a scheme that has laundered millions from unsuspecting Delaware homeowners, and without a valid assignment . . . to foreclose or make any assignment."¹⁰ That is the core of Plaintiff's insistence that the assignee committed "fraud on the court." Plaintiff is emphatic that the challenged assignment at the foreclosure's beginning invalidates the property's eventual sale. It is possible, as Plaintiff insists, that the foreclosing bank was not an assignee when it filed the

⁹ *Gunn*, No. 102, 2009, at 3.

¹⁰ Pl.'s Compl. ¶¶ 6-7.

foreclosure. It is even possible that a questionable assignment was recorded in 2004.

Even so, it was established in the years the foreclosure was in litigation that the assignment was, at one point, perfected and properly recorded. Before allowing the sheriff's sale, and during the subsequent litigation over the confirmation, the court decided that any flaws in the foreclosure's timing and initial paperwork, including the challenged assignment, had been cured. Therefore, despite the foreclosure's questioned beginning, the sheriff's sale was regular.¹¹

Having decided, as a matter of Delaware law, that a plaintiff in a foreclosure can record a valid assignment after a foreclosure's filing, and having decided as a matter of fact that the assignee, well before the property's sale, put its paperwork in order, the court turned to the state of the mortgage. As to that, it was undisputed the mortgage was in default before Plaintiff bought the property, and while the lender and its assignee cured any defects in their complaint during the 7 ½ years the foreclosure was pending, the borrowers' default was not cured.

At most, it appeared that before intervening in the foreclosure in 2009, Plaintiff unsuccessfully attempted to buy the mortgage from U.S. Bank,¹² or otherwise

¹¹ *U.S. Bank Nat. Ass'n v. Johnson*, 2010 WL 705723, at *6 (Del. Super. Feb. 25, 2010) (Silverman, J.) (“It still appears that U.S. Bank was the assignee to the EquiCredit Mortgage.”), *aff'd sub nom. Gunn v. U.S. Bank Nat. Ass'n*, 998 A.2d 850 (Del. 2010) (TABLE).

¹² *Gunn*, No. 102, 2009, at 5 n.6 (Gunn tendered a down payment pursuant to a purported purchase agreement's terms, and was to tender the balance within 45 days of execution. Gunn failed to tender the balance, and the down payment was returned).

stop the foreclosure. But, the record showed no mortgage payments for many years. Throughout the foreclosure, and now, Plaintiff has relied on challenges to the foreclosing bank's bona fides, and other accusations, rather than showing a defect in the mortgage, itself, or the loan's repayment.

In short, at the bottom of the litigation in this court, the Court of Chancery, and the Supreme Court of Delaware are the unchallenged facts: No one besides Plaintiff has challenged the foreclosing bank and its assignee's standing; no one ever satisfied the delinquent loan; and, after more than seven years of litigation, the property was sold and the sale was confirmed. Plaintiff now has no title to the subject property.

II.

On U.S. Bank's behalf, Select Portfolio Servicing, Inc., its servicing agent and attorney-in-fact, has moved to dismiss because Plaintiff does not have title, and, therefore, he is not entitled to a writ of ejectment. That is correct.

First, the complaint does not set out facts supporting the claim that EQCC 1998-2, which SPS argues Plaintiff misidentified, is in possession. As to EQCC 1998-3, which now holds title of record and is in possession,¹³ Plaintiff has fully litigated his title through appeal and lost, twice. Plaintiff's third attempt is

¹³ SPS's Br. in Supp. of Mot. to Dismiss Ex. A.

collaterally estopped and barred by *res judicata*, much like his effort in the Court of Chancery was. The court also notes that Plaintiff failed to respond to SPS's motion to dismiss. Thus, it can be said the motion is unopposed. That, however, is not this decision's reason.

As to the merits, ejectment's essence is that the Plaintiff has legal title to the property.¹⁴ The question is not whether the Plaintiff merely has a better claim to the property than the possessor. Thus, at the threshold, ejectment turns on the Plaintiff's title.¹⁵ Moreover, "[A] defendant in possession peaceably, though without color of title, may defend himself on the weakness of the plaintiff's title."¹⁶

It has already been finally decided that Plaintiff lost title through the sheriff's sale. Plaintiff has no title to the subject property now. That means, as a matter of law, Plaintiff is not entitled to a writ of ejectment, and, therefore, this case is **DISMISSED**. This order of dismissal will become final, however, when the claim against the remaining defendant, Ambac Assurance, is decided in this court.

¹⁴ 10 *Del. C.* § 6701(a). *See also Humes v. Charles H. West Farms, Inc.*, 950 A.2d 661, 665 (Del. Super. 2007) (“[E]jectment determines legal title to property.”).

¹⁵ *See Reed v. Short*, 57 A.2d 90, 94 (Del. Super. 1946) (“[P]laintiff must recover upon the strength of his own title.”).

¹⁶ 2 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* 1080 (photo. reprint 1985) (1906) (citing *Lore v. Hill*, 3 Del. (3 Harr.) 530, 530 (Super. 1842)).

III.

The court takes it that Defendants' counsel was retained by Select Portfolio Servicing, Inc. The relationship between SPS and the EQCC Defendants has been explained above and in the earlier litigation. The core of Plaintiff's claims is that SPS is behind all the alleged fraud and other misconduct. Even if Plaintiff's accusations were proved, which they are not, Defendants are generally entitled to counsel and U.S. Bank does not deny SPS's role as its agent and attorney-in-fact. Moreover, there is no disqualifying conflict between U.S. Bank and SPS's interests.

Plaintiff's motion to disqualify Defendant's counsel is vexatious and, in light of the dismissal, moot. It is **DENIED**.

IT IS SO ORDERED.

/s/ Fred S. Silverman

Judge

oc: Prothonotary (Civil)
cc: Francis G.X. Pileggi, Esquire
Jill Agro, Esquire
La Mar Gunn, Plaintiff, *pro se*, via U.S. Mail